

August 22, 1996

Dear Ms. Jameson:

The Copyright Office has carefully considered the concerns of the Public Broadcasting Service (PBS) regarding the removal of section 118(b)(1) from the Copyright Act, 17 U.S.C. PBS reads section 118(b)(1) as conferring an independent rate making authority on the Librarian of Congress apart from the authority granted to the CARP under 801(b)(1), an interpretation of the section which the Copyright Office does not support. Instead, the Office construes the words in the disputed paragraph, "the Librarian of Congress shall proceed on the basis of the proposals submitted," as a mere articulation of the Librarian's administrative responsibility to convene a CARP when parties with a substantial interest contest the proposed rates and terms.

In sharp contrast to the vague language used in section 118(b)(1) is the language in section 1004(a)(3) which grants the Librarian express authority to independently adjust rates on a scheduled basis.

During the 6th year after the effective date of this chapter, and not more than once each year thereafter, any interested copyright party may petition the Librarian of Congress to increase the royalty maximum and, ... the Librarian of Congress shall prospectively increase the royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum.

Here Congress lays down a formula for adjusting the rates on digital audio recording technology, and specifies that the Librarian will perform the predetermined adjustments according to a schedule, when appropriately petitioned by an interested copyright party. This adjustment requires no negotiations between interested parties, nor consideration of new facts or changes in circumstances. It is merely a rote mathematical adjustment performed by the Librarian when a statutorily defined set of circumstances occur.

Under the Copyright Royalty Tribunal Reform Act of 1993, Congress replaced the former Copyright Royalty Tribunal (CRT) with a system of *ad hoc* arbitration panels under the administration of the Librarian of Congress and the Copyright Office. In the absence of negotiated settlements, the CARPs have the responsibility for determining the distribution of royalties and for determining the adjustment of reasonable terms and rates of the compulsory licenses, not the Librarian of Congress.

Since the Copyright Royalty Tribunal Act placed the authority for rate adjustments in the hands of the interested parties through negotiated licenses, or the CARP in the absence of a negotiated document, the Librarian of Congress cannot assume an authority not granted in the statute. The regulations governing the administration of the CARP, however, allows the Librarian to "adopt the rate embodied in [a] proposed settlement without convening an arbitration panel, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding." See 37 CFR 251.63(b). This approach supports the intent of the law, since it allows the Librarian to adopt only uncontested rates.

Congress spoke approvingly of this regulation in the Senate Report of the Digital Performance Right in Sound Recordings Act of 1995:

Thus, it is the Committee's intention that in such a case, as under the Copyright Office's current regulations concerning the rate adjustments, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding, and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel. See 37 C.F.R. 251.63(b).

Congressional Record, S 11954, August 8, 1995.

Therefore, the Office envisions that a rate adjustment proceeding for the section 118 license will commence with a **Federal Register** notice announcing a voluntary negotiation period, and requesting notices of intent to participate. Once the interested parties negotiate a proposed settlement, the parties would submit this agreement to the Librarian, who would in turn, publish the document in the **Federal Register** with a request for comments on the proposed rates and terms. If no party with a substantial interest and an intent to participate in a CARP files comments, the Librarian would adopt the rates without convening an arbitration panel. The Librarian, however, cannot adopt rates without offering the effected parties an opportunity to comment on the proposed rates.

Of course, interested parties can also negotiate among themselves and file separate agreements with the Copyright Office as specified in section 118(b)(2), but these agreements would apply only to the specific parties who negotiated the license. In this case, the Librarian would not publish the negotiated license in the

Federal Register because this license is a private agreement between the parties who participated in the negotiation of the license.

Although the Librarian of Congress cannot adopt a proposed settlement without allowing the parties who will be effected by the proposed rates and terms an opportunity to comment, the current regulatory process avoids the unnecessary expense of an arbitration where parties with a substantial interest and an intent to participate in the arbitration process do not contest the proposed settlement.

Sincerely,

Marilyn J. Kretsinger
Acting General Counsel

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 253

[Docket No. 96-6 CARP NCBRA]

Noncommercial Educational Broadcasting Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Voluntary negotiation period, precontroversy discovery schedule, and request for Notices of Intent to Participate.

SUMMARY: The Copyright Office of the Library of Congress is announcing a voluntary negotiation period for the 17 U.S.C. 118 noncommercial educational broadcasting compulsory license, along with a precontroversy discovery schedule, request for Notices of Intent to Participate, and initiation date should arbitration proceedings be necessary.

DATES: Notices of Intent to Participate are due on or before December 13, 1996.

ADDRESSES: If sent by mail, an original and five copies of Notices of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If hand delivered, an original and five copies of Notices of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E. Washington D.C. 20540.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, or Tanya Sandros, CARP Specialist, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: Section 118 of the Copyright Act, 17 U.S.C., creates a compulsory license for the use of certain copyrighted works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 C.F.R. part 253 and are subject to adjustment at five year intervals. The last adjustment of the public broadcasting royalty rates and terms occurred in 1992, thus, making 1997 a window year for the adjustment of these rates and terms.

Section 118(b) provides that copyright owners and public broadcasting entities may voluntarily negotiate licensing agreements at any time, and that such licensing agreements will be "given effect in lieu of any determination by the Librarian of Congress; Provided, That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations that the Register of Copyrights shall prescribe." 17 U.S.C. 118(b)(2).

Those parties not subject to a negotiated license must follow the rates and terms adopted through arbitration proceedings conducted under chapter 8 of the Copyright Act. Section 118(b)(3) provides:

In the absence of license agreements negotiated under paragraph (2), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Librarian of Congress.

Subsection (c) provides that these procedures are to "be...concluded between June 30, and December 31, 1997...."¹

In order to commence the adjustment process described in section 118, the Copyright Office of the Library of Congress is publishing today's notice. With respect to private licenses, we note that the statute provides that they may be negotiated at any time and must be submitted to the Copyright Office in order to be effective. However, in keeping with Copyright Royalty Tribunal tradition, see e.g. 57 FR 29066 (June 30, 1992), we believe that it is appropriate and efficient to designate a negotiation period, prior to copyright arbitration royalty panel (CARP) proceedings, in order to encourage private agreements and, possibly, avoid the need for a CARP. Consequently, we are announcing a voluntary negotiation period commencing November 1, 1996 and running to December 13, 1997. Any agreements entered into during this period should be deposited with the Copyright Office in accordance with the regulations established in 37 C.F.R. 201.9. Of course, license agreements may still be negotiated and deposited prior to, and after, the designated negotiation period.

In the absence of negotiated licenses, the Librarian of Congress will convene a CARP to determine rates and terms for the section 118 license. The proceeding will be conducted according to the following schedule.

Notices of Intent to Participate

Any party wishing to appear before the CARP, and to present evidence, in this proceeding must file a Notice of Intent to Participate

¹ Section 253.1 of the Copyright Office's rules, 37 C.F.R., provides that the current statutory terms and rates for the §118 license will expire on December 31, 1997.

by December 13, 1996. Failure to file a timely Notice of Intent to Participate will preclude a party from participating in this proceeding.

Precontroversy Discovery Schedule

The Library of Congress is announcing the scheduling of the precontroversy discovery period, and other procedural matters, for the establishment of rates and terms for the section 118 compulsory license. In addition, the Library is announcing the date on which arbitration proceedings will be initiated before a CARP, thereby commencing the 180-day arbitration period. Once a CARP has been convened, the scheduling of the arbitration period is within the discretion of the CARP and will be announced at that time.

A. Commencement of the proceeding. A rate adjustment proceeding under part 251 of 37 CFR is divided into two essential phases. The first is the 45-day precontroversy discovery phase, during which the parties exchange their written direct cases, exchange their documentation and evidence in support of their written direct cases, and engage in the pre-CARP motions practice described in section 251.45. The other phase is the proceeding before the CARP itself, including the presentation of evidence and the submission of proposed findings by all of the participating parties. The proceeding before the CARP may be in the form of hearings or, in accordance with the requirements of section 251.41(b) of the rules, the proceeding may be conducted solely on the basis of written pleadings.

Both of these phases to a rate adjustment proceeding require significant amounts of work, not just for the parties, but for the Librarian, the Copyright Office, and the arbitrators as well. The rates and terms proceeding for section 118 is not the only CARP proceeding likely to take place during 1997. Other proceedings will include

distribution of cable, satellite and digital audio royalties, as well as rate adjustment proceedings for satellite, the digital performance license (§114) and the mechanical license (§115). It would be extremely difficult for the Office to conduct the precontroversy discovery phase of more than one of these proceedings at the same time, and the Library must, therefore, conduct them sequentially.

Because of the number of CARP proceedings to be conducted this year, and the attending workload, selection of a date to initiate a section 118 rate setting proceeding is not dependent on the schedules of one or more of the participating parties, but must be weighed against the interests of all involved. The parties affected by section 118 are most likely aware that 1997 is a window year for the adjustment of terms and rates, and, as described above, are being given a formal negotiation period to reach agreements. Because of the other proceedings which must be scheduled, the attending workload, and the need to manage the interests of all involved, the Library is announcing the precontroversy discovery schedule and arbitration period in this proceeding without seeking further comment from the participating parties.

B. Precontroversy Discovery Schedule and Procedures. Any party that has filed a Notice of Intent to Participate in the section 118 adjustment proceeding is entitled to participate in the precontroversy discovery period. Each party may request of an opposing party nonprivileged documents underlying facts asserted in the opposing party's written direct case. The precontroversy discovery period is limited to discovery of documents related to written direct cases and any amendments made during the period.

The rules of the Library of Congress do not specify any particular steps or regimen to the precontroversy discovery period. We believe, however, that it is necessary to establish procedural dates for exchange of documents and filing of motions within the 45-day period to provide order and allow discovery to proceed smoothly and efficiently. The precontroversy discovery schedule set forth by the Library in the recent cable distribution proceeding, see 54 FR 14971, 14975-76 (March 21, 1995), proved to be successful in promoting an orderly and efficient discovery period, and we have chosen to adopt the same format and structure for the precontroversy discovery period in this proceeding.

The following is the precontroversy discovery procedural schedule with corresponding deadlines:

Action	Deadline
Filing of Written Direct Cases	January 10, 1997
Requests for Underlying Documents Related to Written Direct Cases	January 17, 1997
Responses to Requests for Underlying Documents	January 24, 1997
Completion of Document Production	January 31, 1997
Follow-up Requests for Underlying Documents	February 5, 1997
Responses to Follow-up Requests	February 10, 1997
Motions Related to Document Production	February 14, 1997
Production of Documents in Response to Follow-up Requests	February 19, 1997
All Other Motions, Petitions, and Objections	February 24, 1997

The precontroversy discovery period, as specified by section 251.45(b) of the rules, begins on January 10, 1997 with the filing of written direct cases by each party. Each party in this proceeding who

has filed a Notice of Intent to Participate must file a written direct case on the date prescribed above. Failure to submit a timely filed written direct case will result in dismissal of that party's case. Parties must comply with the form and content of written direct cases as prescribed in section 251.43. Each party to the proceeding must deliver a complete copy of its written direct case to each of the other parties to the proceeding, as well as file a complete copy with the Copyright Office by close of business on January 31, 1997, the first day of the 45-day period.

After the filing of the written direct cases, document production will proceed according to the above-described schedule. Each party may request underlying documents related to each of the other parties' written direct cases by January 17, 1997 and responses to those requests are due by January 24, 1997. Documents which are produced as a result of the requests must be exchanged by January 31, 1997. It is important to note that all initial document requests must be made by the January 17, 1997 deadline. Thus, for example, if one party asserts facts that expressly rely on the results of a particular study that was not included in the written direct case, another party desiring production of that study must make its request by January 17, 1997; otherwise, the party is not entitled to production of the study.

The precontroversy discovery schedule also establishes deadlines for follow-up discovery requests. Follow-up requests are due by February 5, 1997, and responses to those requests are due by February 10, 1997. Any documentation produced as a result of a follow-up request must be exchanged by February 19, 1997. An example of a follow-up request would be as follows. In the above example, one party expressly relies on the results of a particular study which is not included in its written direct

case. As noted above, a party desiring production of that study or survey must make its request by January 17, 1997. If, after receiving a copy of the study, the reviewing party determines that the study heavily relies on the results of a statistical survey, it would be appropriate for that party to make a follow-up request for production of the statistical survey by the February 5, 1997 deadline. Again, failure to make a timely follow-up request would waive that party's right to request production of the survey.

In addition to the deadlines for document requests and production, there are two deadlines for the filing of precontroversy motions. Motions related to document production must be filed by February 14, 1997. Typically, these motions are motions to compel production of requested documents for failure to produce them, but they may also be motions for protective orders. Finally, all other motions, petitions and objections must be filed by February 24, 1997, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, but are not limited to, objections to arbitrators appearing on the arbitrator list under section 251.4, and petitions to dispense with formal hearings under section 251.41(b).

Due to the time limitations between the procedural steps of the precontroversy discovery schedule, we are requiring that all discovery requests and responses to such requests be served by hand or fax on the party to whom such response or request is directed. Filing of requests and responses with the Copyright Office is not required.

Filing and service of all precontroversy motions, petitions, objections, oppositions and replies shall be as follows. In order to be considered properly filed with the Librarian and/or Copyright Office, all pleadings must be brought to the Copyright Office at the following

address no later than 5 p.m. of the filing deadline date: Office of the Register of Copyrights, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540. The form and content of all motions, petitions, objections, oppositions and replies filed with the Office must be in compliance with sections 251.44(b)-(e). As provided in section 251.45(b), oppositions to any motions or petitions must be filed with the Office no later than seven business days from the date of filing of such motion or petition. Replies are due five business days from the date of filing of such oppositions. Service of all motions, petitions, objections, oppositions and replies must be made on counsel or the parties by means no slower than overnight express mail on the same day the pleading is filed.

C. Initiation of Arbitration. Because there are two phases to a rate adjustment proceeding -- precontroversy discovery and arbitration -- there are two time periods to be scheduled. The regulations do not provide how much time must separate precontroversy discovery from initiation of arbitration. There is no reason to schedule an inordinate amount of time between the two; however, there must be adequate time for the Librarian to rule upon all motions filed within the 45-day precontroversy period. The Librarian is also mindful that the arbitration phase must be concluded, and the Librarian's review of the panel's decision must be completed, by December 31, 1997. Consequently, the Library will initiate arbitration on April 7, 1997. The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected. Delivery of the written report of the arbitrators to the Librarian, in accordance with 17 U.S.C. 802(e), must be no later than October 3, 1997.